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No. 05-

In the
Supreme Court of the United States

JOHN H. MIDLEN, JR.,

Petitioner,

v.

BAR COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a disciplinary proceeding in the District of Columbia against an attorney admitted to practice there (and in this Court). As such, it was an "adversary proceeding[] of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551 (1968).

1. Whether in attorney disciplinary proceedings the District of Columbia Court of Appeals may rely on facts not found by the trier of fact, in view of *Blakely v. Washington*[1]?

2. Whether in governance of the legal profession, the District of Columbia--the functional equivalent of a state[2]--through its highest court, may empower clients to unilaterally abrogate their contracts of engagement with attorneys, given the constriction of Article I, Section 10 of the United States Constitution?

3. Whether due process requires that in interpreting rules of professional conduct, the District of Columbia Court of Appeals is bound to follow principles of statutory construction laid down by this Court?

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[1] ___ U.S. ___, 124 S.Ct. 2531 (2004).

[2] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

PARTIES TO THE PROCEEDING

Petitioner is John H. Midlen, Jr., an individual citizen and domiciliary of the State of Maryland.

Respondent is the Bar Counsel of the District of Columbia; currently serving in that post is Wallace E. Shipp, Jr.

RULE 29.6 STATEMENT

Petitioner is not a corporation.

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Appendix B—Order of the District of Columbia Court of Appeals Denying Petition for Rehearing En Banc, Dated March 30, 2006 ..... 26a

Petitioner John H. Midlen, Jr. respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported below as *In re John H. Midlen, Jr.* and appears at 885 A.2d 1280. It is reproduced at page 1a of the Appendix to this petition. The order of that court denying rehearing *en banc* is reproduced at App. 26a.

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 10, 2005. A timely filed petition for rehearing *en banc* was denied on March 30, 2006. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) and –(b).

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS

1. Pertinent provisions of the United States Constitution are:

Article I, Section 10, clause 1:

> No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendment V: "No person shall * * * be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Pertinent administrative provisions are Rules 1.15(b) and –(c) and 1.16(d) of the Rules of Professional Conduct of the District of Columbia,[1] as follows:

> Rule 1.15:
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.
> (c) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and

[1] They may also be found online at: http://www.dcbar.org/for%5Flawyers/ethics/legal%5Fethics/rules%5Fof%5Fprofessional%5Fconduct/

> severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).
>
> Rule 1.16(d):
> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....

The corresponding Model Rules of Professional Conduct of the American Bar Association are set out in the text or footnotes below and are printed in 2005 *Martindale-Hubbell Law Digest* at pp. ABA 22-23 and are published online at http://www.abanet.org/cpr/mrpc/mrpc_home.html.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner, John H. Midlen, Jr. (hereinafter Midlen), is an attorney licensed to practice in the District of Columbia and, *inter alia*, in this Court. When the judgment below

became effective, he was "suspended from the practice of law in the District of Columbia for eighteen months." App.25a. Following receipt in April 1998 of a complaint from one of Midlen's clients, Jimmy Swaggart Ministries (hereinafter JSM), this case began in December 2000 when Respondent, Bar Counsel for the District of Columbia (hereinafter Bar Counsel), lodged ten numbered charges against Midlen, each for an alleged infraction of a District of Columbia Rule of Professional Conduct. The triers of fact, Hearing Committee Number One, determined that Bar Counsel had abandoned or failed to prove all charges save one,[2] as to which it recommended an informal admonition. This case came to the District of Columbia Court of Appeals (hereinafter "Court" or "DCCA") on Midlen's exceptions from the Report and Recommendation of the Court's subordinate agency, the Board on Professional Responsibility ("BPR Report"). The Board overturned the Report and Recommendations of Hearing Committee Number One on Violations ("Violations Report") and its Recommendation on Sanction. On Bar Counsel's exceptions, the Board rejected both Committee Reports and concluded that Midlen had recklessly misappropriated client funds in violation of Rule 1.15(c). This Rule is patterned after and differs not in any material respect from the American Bar Association's corresponding Model Rule:

DC Rule 1.15(c)	ABA Model Rule 1.15(e)[3]
(c) When in the course of	(e) When in the course of

[2] The Committee found that Midlen violated Rule 1.15(b) of the D.C. Rules of Professional Conduct in being *slow* to render an accounting to JSM.

[3] 2005 *Martindale-Hubbell Law Digest* at p. ABA-22

representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).	representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer [until] the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Continuing, the Board found that Midlen had delayed rendering an accounting; and that he had acted dishonestly when he signed a settlement agreement Addendum, which, the Board found, was executed contrary to the client's instruction—with which the Hearing Committee specifically

found Midlen had *not* been charged[4]--and then kept secret from the client; and that he was too slow in turning over files to successor counsel. The Board recommended Midlen's disbarment. On appeal, the Court held that Midlen had negligently, but not recklessly or dishonestly, misappropriated JSM's funds, and it agreed with the Board that Midlen was late with the accounting, had signed the Addendum dishonestly, and was too slow in turning over files. As noted above, it rejected its Board's recommended ultimate sanction.

The DCCA, for at least a decade, has interpreted Rule 1.15(c) to mean that when an attorney and client are engaged in a fee dispute, the attorney may not deduct his disputed fees from funds held in escrow unless and until the fee dispute is resolved.[5] Not only does Midlen not contest that interpretation, Midlen understood it and had early on informed JSM's general counsel of that principle.[6] But the

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[4] Violations Report at 39.

[5] *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995): "The test, however, is not whether, when examining the circumstances objectively, one would conclude that respondent was legally entitled to the amount claimed; rather the test should be whether there was in fact a fee disagreement between the parties concerning respondent's entitlement to the amount withdrawn at the time of withdrawal. The rule is unambiguous: an attorney may not withdraw a portion of the deposited funds when the attorney's right to receive that portion is 'disputed' by the client."

[6] Cited in one of the Hearing Committee's findings was a letter from Midlen to JSM's general counsel in which Midlen laid out this principle as follows:

> . . . in no way could it be or have been construed that the amount ultimately charged for legal work was in contest.

DCCA had never, heretofore, held that a client's late-formed disputation of its counsel's underlying right to deduct undisputed fees from escrow pursuant to an engagement agreement unilaterally abrogated that attorney-client contract. The challenged opinion below "radically changed and extended the rule." *Holmes v. Gay*, __ U.S. __, 126 S.Ct. 1727, 1733 (2006).

In the case at bar, Midlen's representation of JSM commenced with an engagement agreement that permitted him to apply collected copyright royalties to any balance due for his legal fees. Initially, JSM concurred; then it sought to change the arrangement—which, several times, Midlen rebuffed; then JSM challenged his very entitlement to

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> Had it been, none of the funds would have left my escrow account. Which would have meant JSM would not have received its end-of-year two hundred grand, the legal bill would not have been discounted and not only would JSM's proceeds have arrived in Baton Rouge later, they would have been smaller.[2] Given the Ministry's payment history, the one thing that is not negotiable is that I remit anything to JSM while leaving payment of my legal fees to some future agreement and compensation. First, I am not that naive. Second, I think such an arrangement would be contrary to the District of Columbia Rules of Professional Conduct because it would transform what has been agreed upon in writing between me and JSM into *ad hoc* oral negotiating. Not exactly a scenario that builds attorney/client trust or respect.
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> 2. Presumably, and without researching the matter now, what was "in contest" would have been retained in escrow, the uncontested legal fees paid and the difference wired to Baton Rouge

withdraw legal fees from the collected royalties. As to one of the years' royalty collections, an Addendum to a previously executed Settlement Agreement became necessary in order to move funds out of a common escrow for distribution to individual claimants such as JSM.

The Court's opinion with regard to both violations and sanction rests on three core holdings: (a) Midlen deducted fees from escrowed royalty payments "when he could not reasonably have doubted that JSM disputed his entitlement to the fees." App. 2a. (b) "[B]y September 1998 when Midlen withdrew from the escrow account attorney's fees totaling more than $12,000, it could not have escaped his knowledge that . . . this was 'without authorization of [JSM]' and that JSM disputed his entitlement to [withdraw] the fees." App. 13a; (c) "Midlen (i) executed the Addendum in direct contravention of his client's instructions; and (ii) failed to tell his client that he had taken this action, even though he had several opportunities to do so." App. 23a-24a (internal quotations omitted). To make these holdings, the Court expressly adopted the Board's factual findings and inferentially rejected the Committee's findings, including its credibility findings.[7] This was improper, and violated due process, because both the Board and the Court were bound to accept the Committee's factual findings, especially its credibility findings. Instead, in complete rejection of this Court's reasoning in *Blakely v. Washington*, 542 U.S. 246 (2004) the

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[7] The Court adopted the Board's factual findings, summarizing those pertaining to the misappropriation charge, App. 3a-8a, and quoting almost verbatim others relating to the dishonesty charge. *Id. at* 18a-22a.

Board, to be followed by the DCCA, went on to make findings not found by the triers of fact and in most respects contrary to the findings made by the triers of fact.[8] Moreover the Court's opinion fundamentally changed the parameters of attorney-client engagement contracts by confusing impermissible client conduct with a "fee dispute," App. 13a-14a, thereby necessitating abrogation of the engagement agreement. As to the accounting charge, the Court improperly construed Rule 1.15(b), failing to apply this Court's fundamental rules of statutory construction, in violation of due process.

The sanction ordered by the Court also violates due process, because it adopted the Board's tainted findings, ignoring completely Midlen's unblemished career, his leadership involvement with his church, other mitigation evidence, and the absence of any need to protect the public. Moreover, the sanction is inconsistent with those imposed in recent comparable negligent misappropriation and dishonesty cases, in violation of D.C. Bar R. XI §9 (g) and, to the extent the sanction relies on facts that the Committee did not find, violates Midlen's right to due process under *Blakely v. Washington.*

The Violations Report is the product of four days of evidentiary hearings where the Hearing Committee heard testimony from nine witnesses and received into evidence over 200 exhibits. The Report is organized into 132

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[8] The Court dropped a footnote suggesting that the Board's findings of fact were not contradictory of the Committee's findings of fact. App. 12a (note 7). Such is pure fiction, as is set out *infra* at p. 10 n.8 and pp.13-14.

numbered Findings ("Violations Findings") and, in a separate section, unnumbered Conclusions of Law, including credibility findings. In addition, there are subsidiary findings of basic facts within the Conclusions of Law, *e.g.* that JSM briefly protested legal fees twice but the fees were not disputed at the time Midlen withdrew them and, notwithstanding Midlen's offer to let successor counsel review the JSM files anytime he wished, that offer was never accepted.[9] The Violations Report includes both implicit and explicit credibility determinations.[10]

Bar Counsel never argued, not in his[11] Brief or at oral argument, that the Violations Findings were not supported by substantial evidence, and he ultimately conceded the validity of the Violations Findings and embraced them in their

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[9] Many other such findings are in the Violations Report: (JSM knowledgeable about Addendum), (no charge of unauthorized action by counsel), (Midlen sent the Addendum as escrow agent), (Midlen credited: once a new invoice is printed, prior hours' work cannot be retrieved from computer), (Bar Counsel contention "frivolous"), (Midlen needed files to prepare accounting), (Bar Counsel attempted to elicit testimony from witness he knew to be unknowledgeable as well as made a proffer without a factual basis), (in the period preceding file turnover, Midlen was "organizing and disentangling the various files"), and (various findings regarding improper conduct of prosecutor).

[10] *See, e.g.*, Violations Finding 31 (re: complainant), Violations Finding 131 (re: complainant), and Violations Finding 132 (Midlen was "entirely credible;" complainant "was deliberately evasive and unhelpful;" and complainant's sister/executive assistant "knew very little").

[11] At the time of proceedings before the Hearing Committee and the Board, the post of Bar Counsel was occupied by a female.

entirety.[12] Therefore, when Bar Counsel's exceptions were considered by the Board, and then when this case was heard by the Court, there was no dispute that substantial evidence supported the Committee's Violations Findings. In other words, it was stipulated that there was "enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (citation omitted).

The Court below knew it was "bound – as is the Board – by the hearing committee's findings of fact." *In re Austin*, 858 A.2d 869, 877 (D.C. 2004) citing *In re Kitchings,* 779 A.2d 926 (D.C. 2001), after remand, 2004 D.C. App. LEXIS 397 (Board was obligated to accept stipulation of facts between respondent and Bar Counsel). The Board certainly did not consider itself "bound" by the Committee's Violations Findings. Rather, the Board reviewed the written record and *sua sponte* found new facts, ignoring all aspects exculpatory of Midlen,[13] thereby violating his "right to have 'a meaningful opportunity to

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[12] This occurred at Oral Argument before the Board. Based on this, Midlen filed a motion to dismiss, which the Board denied on its merits.

[13] This hardly passes muster under *Holmes, supra*, 126 S.Ct. at 1735:

> by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary". . . .

present a complete defense.'"[14] In doing so, the Board violated its own Rule 13.7 which dictates that, "[w]hen reviewing the findings of a Hearing Committee, the Board shall employ [the] 'substantial evidence on the record as a whole' test" (emphasis added) and reduced this case to a mere paper proceeding.[15] Except in the case at bar, the DCCA has consistently held that Rule 13.7 requires the Board to defer to a hearing committee's findings of subsidiary facts, *e.g., In re Micheel*, 610 A.2d 231, 234 (D.C. 1992),[16] and to a hearing committee's credibility findings. *In re Appler*, 669 A.2d 731, 739 (D.C. 1995); *In re Gilchrist*, 488 A.2d 1354, 1357 (D.C. 1985).

Nor did the Court consider itself "bound" by the Committee's Violations Findings—even in the face of the *Blakely* argument with which it was presented. Instead, the Court accepted almost uncritically the Board's flawed factual findings, contrary to *Austin, supra,* and its antecedents, compounding the Board's violation of its Rule 13.7. And,

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[14] *Id.*

[15] The Board interpreted the predecessor to Rule 13.7 to permit the Board only to "'make additional findings of fact . . . which are uncontested on the record,' *i.e.*, which do not contradict Committee findings that are supported by substantial evidence." *In re Anderson*, 778 A.2d 330, 341 n.8 (D.C. 2001) quoting *In re Chang*, 694 A.2d 877, 879 n.3 (D.C. 1997) (Board Report). In *Chang*, the Board recognized its authority to be limited to making additional findings of fact "which are uncontested on [the] record and supported by clear and convincing evidence." 694 A.2d at 879 n.3 (emphasis added); see also Rule 13.7.

[16] The Court noted *Micheel*, *see* App. 12a, n.7, but failed to apply it faithfully to this case.

like the Board, the Court ignored the Committee's credibility findings, although the Committee was uniquely able to see and hear the witnesses, observe their demeanor, and assess their trustworthiness and integrity, notwithstanding that the Court knew better.[17]

The Court's improper deference to the Board's factual findings, rather than to the Committee's factual findings, and especially the Court's disregard of the Committee's credibility findings, denied Midlen due process.[18] Each of the Court's core holdings described above is irreconcilable with the pertinent facts found by the Committee. With regard to the core holdings on the misappropriation charge, the Committee wrote, "The Committee finds JSM briefly disputed [Midlen's] fees in late 1994 and again in 1996, but failed to reply to [Midlen's] repeated invitations to specify its criticism or resolve the dispute." Continuing, it said "Respondent drew the entirely reasonable conclusion that JSM had answered whatever questions it had. Respondent thus believed that JSM no

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[17] *In re Soininen*, 853 A.2d 712, 725 (D.C. 2004), "The Hearing Committee saw and heard Ms. Soininen testify, and was in the best position to assess her demeanor and credibility at the hearing on May 20, 2002. We must therefore accept the Committee's evaluation of her testimony." *See also In re Haar, supra,* 667 A.2d at 1354 (emphasis added).

[18] The Court below long ago recognized the fundamental principle that, because "disciplinary proceedings are quasi-criminal in nature and . . . an attorney who is the subject of such proceedings is entitled to procedural due process safeguards." *In re Williams*, 464 A.2d 115, 118-119 (D.C. 1983) citing *In re Ruffalo, supra*, 390 U.S. at 550.

longer disputed his fees when he withdrew money from his escrow account to satisfy JSM's outstanding fee obligation." Further, "The Committee finds that [Midlen] did all that could reasonably be expected of a lawyer with a deliberately uncommunicative client. JSM, which had the benefit of advice from two outside lawyers . . . never framed its dispute with [Midlen] as a dispute over fees." The Committee properly understood JSM's rebuffed efforts to change the underlying engagement contract for what they were; contrarily, the Court, by equating that with a "fee dispute" under *Haar, supra,* unconstitutionally adopted a rule abrogating contracts of engagement any time an unhappy client seeks to change unilaterally the remission of damages or recovered funds provisions therein. *United States Constitution, Article I, section 10.*

Similarly, the core holding on the dishonesty charge—which rises or falls on the presence or absence of an underlying rules violation--conflicts with the Committee's relevant findings and flies in the face of *Blakely*. For example: "As JSM had not raised any specific objections [to the Addendum], [Midlen] executed the Addendum on behalf of [Jerry Falwell's] Old Time [Gospel Hour] and JSM on December 16, 1997. . . ." And, "JSM never indicated a specific objection to the Addendum during the several months it was being discussed...." Moreover, "nor did [Midlen] receive [JSM's other counsel's] letter . . . [instructing Midlen not to sign] until after the Addendum had been signed." Extremely significant: "The Committee finds it more likely that [Midlen] executed the Addendum because he had said he would." There followed: "The execution of the Addendum was a ministerial act, in [Midlen's] view."

"[Another witness], who was counsel for other claimants in the process, also testified that he regarded it as ministerial. . . ." and "JSM had given [Midlen] conflicting instructions about the Addendum. . . ." Ultimately, "[t]he Committee finds that JSM tried to use the execution of the Addendum as away to ask again for information from [Midlen], and possibly a way for JSM to delay its payment of legal bills to him." Moreover, DCCA's core holdings could not have been reached without rejecting the Committee's credibility findings, *e.g.*, "The Committee found [Midlen], by contrast [to the complainant], to be entirely credible. His answers, even if prolix on occasion, were forthright, responsive, and candid." Discussing the complainant's credibility: "Based on the Committee's assessment of Mrs. Swaggart's testimony and of her demeanor, we find that she was not a credible witness."

There are constitutional limits to the sanction that the DCCA may impose because an attorney who is the subject of disciplinary proceedings is entitled to procedural due process safeguards. Citing this Court's *In re Ruffalo* in its own *In re Williams, supra,* 464 A.2d at 118-119, the DCCA nonetheless here violated Midlen's due process rights by imposing a sanction harsher than that which the Committee's factual findings would allow. *Blakely v. Washington, supra,* dealt with criminal sentencing by a judge and the Sixth Amendment right to have a jury determine the facts upon which a sentence is based. As the Court explained, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . , and the judge exceeds his proper authority." 542 U.S. at 304. *See also*

United States v. Booker, ___ U.S. ___, 125 S.Ct. 738, 749 (2005). This rationale is equally compelling in disciplinary cases in light of the due process rights that attach to these proceedings. The Court below has established Rules to implement a wholly analogous process that assigns a jury's fact-finding function to a hearing committee, imposes the rigorous clear and convincing evidence standard of proof, and demands deference to the facts so found. Thus, the Court below exceeded its "proper authority" when it ordered a sanction based on facts which a hearing committee did not find and which are essential to the sanction imposed, *i.e.*, those underlying the core holdings described above which (a) are contradicted expressly by the Committee's actual findings and (b) rest improperly on the Court's inferential rejection of the Committee's credibility findings.

In resolving the two minor issues, *i.e.*, tardiness of the accounting and tardiness of the transfer of files to successor counsel, against Midlen, the Court ignored or rejected this Court's guidance on statutory construction. Even the DCCA has earlier held that principles of statutory construction apply to interpretation of rules of professional responsibility. *Neuman v. Ackman*, 715 A.2d 127, 131 (D.C. 1998) (applying principles of statutory construction to Rules of Professional Conduct). As to the accounting—which was provided and was never challenged--several of this Court's familiar rules of statutory construction are applicable to this case, including the *plain meaning* rule[19] and the rule requiring that ordinary rules of grammar, such as the last

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[19] *United States v. Cleveland Indians Baseball Co.* 532 U.S. 200, 121 S.Ct. 1433, 1440 (2001).

antecedent rule, be applied.[20] The Court below gave Rule 1.1.5(b) a tortured reading, in violation of the plain meaning and last antecedent rules to find JSM was entitled to *any* accounting, and even if it were, that Midlen was slow to notify and to account to JSM for the royalty payments he received on its behalf.

Rule 1.15(b) provides in its entirety:

> Upon receiving funds or other property in which a client or third person *has an interest,* a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person *is entitled to receive* and, upon request by the client or third person, shall promptly render a full accounting regarding *such property*, subject to Rule 1.6. (Emphasis added).

The DCCA's first error was in concluding that the Rule's notice requirement applied to this case. Rule 1.15(b) commences with a notice obligation, the applicability of which is to funds "in which a client or third person *has an*

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[20] *Jama v. Immigration and Customs Enforcement*, ___ U.S. ___, 125 S.Ct. 694, 700-01 (2005) ("[T]he grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)).''

interest...." (Emphasis added). However, the *undisputed* evidence showed that JSM had no interest in the funds, other than to know how much its debt to [Midlen] might be reduced by the application of the royalties thereto. Since JSM had no interest in the funds on deposit due to its zero net entitlement, it cannot be said that the funds in issue were funds in which the client "ha[d] an interest"; therefore as to JSM there was no notification requirement at all – prompt or otherwise. Accordingly, it was error to have found a Rule 1.15(b) notice violation. Even were that not error, the Court clearly erred by interpreting the rule to require an accounting of funds regardless of JSM's entitlement to receive them. The Rule in fact requires only an accounting for "any funds or other property that the client or third person *is entitled to receive*" (emphasis added), activating the rule of the last antecedent. In effect, the Court interpreted the Rule so that the term "such property" within the phrase "shall promptly render a full accounting regarding *such property*" to refer back to the term "has an interest," skips over the last antecedent "entitled to receive."[21] The last antecedent phrase "entitled to receive" is much narrower than "has an interest." Therefore, since an accounting, prompt or otherwise, is due only as to funds a client is entitled to receive and JSM was entitled to receive none--the Committee found that JSM was not entitled to receive any of the royalty distributions "because [Midlen] was entitled to deduct unpaid legal fees from any cable royalty distributions awarded to JSM"[22]--it was due no

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[21] The premise is strengthened by the fact that the two terms are contained in the same sentence, whereas the phrase "has an interest" is in the preceding sentence.

[22] Further, "JSM was well aware of its outstanding unpaid legal fees to [Midlen] (reaching a high total of $70,787.76 by May

accounting. Accordingly, Midlen could not have violated the accounting obligation of Rule 1.15(b) as written.

In determining that Midlen was unacceptably slow to turn over the files to successor counsel, the Court below not only violated *Blakely* by relying on facts found by the Board which were contrary to those found by the Committee, *e.g.*, note 9, *supra*, but violated this Court's *plain meaning* injunction. Bar Counsel's charging document misleadingly alleged that Midlen "failed to take timely steps to the extent reasonably practicable to protect the client's interest, by failing to surrender papers and property to which the client was entitled . . . ." However, Rule 1.16(d) reads:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....

The plain meaning of the Rule is that it is mandatory as to insuring protection of the client's interest but is merely descriptive as to how that may be done; "such as" certain methods are suggested, including surrendering papers. Apparently the Court below would have "such as" read instead "including but not limited to." It cannot be seriously

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1996) and that any cable royalty distribution it would receive in late 1997 or early 1998 would not cover unpaid legal fees that were $34,806.44 on December 30, 1997."

suggested that JSM's interests were not adequately protected given the findings that are part of the Hearing Committee's Conclusions of Law[23] and other uncontradicted evidence. It is up to counsel how to protect the client's interests, not the client and not, with the benefit of 20-20 hindsight, the Court. So long as the client's interests are adequately protected, there can be no rule violation.

Finally, the Board, for all of the things it did wrong, properly conceded that JSM was in no way injured by any of the alleged rule violations. BPR Report at 75. This, the DCCA ignored.

B. Arguments Raised Below Rule 14(g)(i)

The plain meaning and ordinary grammar arguments were first raised before the Board in Respondent's Motion to Dismiss, filed in June 2003, and were rejected on the merits in its BPR Report dated July 15, 2004. The due process and

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[23] Midlen "wrote, though, that he would have some trouble extracting the JSM file from the other files that pertained to Old Time and to the cable royalty process generally." *See BX 23* see also Tr. III at *122-23*. "Furthermore, [Midlen] gave [JSM's new counsel] access to the JSM files before he turned over copies of the files to him." TR. III at 123. "The Committee, which found [Midlen] credible in this and other respects, accepts this explanation for the delay." New counsel "never came to examine them. Bar Counsel has not identified any way in which the delay in turning over the file failed to safeguard the client's interests during the ongoing royalty proceeding." *See also* RX 146; Tr. IV 109-113 ([Midlen]).

Blakely arguments were raised before the Court below in Midlen's brief on exceptions filed in October 2004 and in his Reply Brief filed in January 2005. They were rejected or ignored. The plain meaning and ordinary grammar arguments were also rejected by the DCCA. All of the foregoing plus the Article I, Section 10 argument were raised in Midlen's Petition for Rehearing which was denied without opinion. App. 26a.

REASONS FOR GRANTING THE PETITION

A. The District of Columbia Court of Appeals' Interpretation of What Constitutes "Misappropriation" Under Rule 1.15(c) of the Code of Conduct Has National Implications Given Its Similarity to the Model Rule and Corresponding Rules of All or Most Other State Jurisdictions, and Does Not Admit of Application In the Face of Contrary Findings by the Triers of Fact—An Important Federal Question That Has Not Been, But Should Be, Settled by This Court

Initially it is noted that the triers of fact found, as we have quoted above, that there was no fee dispute between Midlen and his client, JSM. Shortly after it was conceded on the record by Bar Counsel that the Hearing Committee's findings of fact were not contested, Midlen filed with the Board his exhaustive "Respondent's Motion to Dismiss" establishing that given the Committee's voluminous and comprehensive findings, it was impossible to arrive at any

conclusions of guilt of any rules infractions. That motion predated this Court's opinion in *Blakely* by about one year, but action by the Board was still three weeks away at the time *Blakely* was decided. *Blakely* generated enormous media coverage at the time of its release due to perceived implications for the Federal Sentencing Guidelines. Evidently, the Board was oblivious.

Midlen's right to be judged by a committee of his peers was created by DCCA rule. Blakely's right to be judged by a jury of his peers was created by the Sixth Amendment. It is well settled that once bestowed, a right may not be withdrawn without due process of law.[24] Thus,

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[24] *Bowen v. Roy*, 476 U.S. 693, 731-32 (1986)(O'Connor, concurring in part and dissenting in part):

> The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution:
> "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6 [89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600] (1969). "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 [83 S.Ct. 1790, 10 L.Ed.2d 965] (1963)" *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970) (footnote omitted).

this Court is confronted with the issue of whether *Blakely* and its principle should be extended from the criminal context to the quasi-criminal attorney disciplinary context. Given that it would not ordinarily occur to the reasonable man (or reasonable attorney) that a client's unilateral attempt to amend a bilateral legal services contract is tantamount to a fee dispute, the DCCA's holding to the contrary is of national significance and importance since all, or most, states have a similar rule of professional conduct on their books. See ABA Rule 1.15(e), *supra* at 4. There having been found that no fee dispute existed, that finding should not have been displaced simply because the Court saw the legal interpretation differently. Misappropriation was, of course, the eight hundred pound gorilla in the action below. Without the usurpation of fact finding contrary to *Blakely*, no such finding by the Court could have occurred and without it the sanction administered could not have happened. With the DCCA's opinion on the books, personal injury and all other attorneys nationwide who are to be paid out of the corpus are at risk of having their reputations sullied, as has been Midlen's, and their livelihoods destroyed.

Similarly, the triers of fact found that Midlen had not been charged with taking an action (signing the Addendum) not countenanced by his client and specifically refused to make findings that would look to such a charge. Undaunted, the Court went ahead and made its own findings, based on the Board's findings, as if such a charge had been lodged. It would seem that no more flagrant violation of the *Blakely* command is possible. The comparison is compelling: the

guilt was "based not on facts proved to his peers beyond a reasonable doubt,[25] but on facts extracted after trial from a report compiled by a probation officer[26] who the judge thinks more likely got it right than got it wrong." 124 S.Ct. at 2542. As Justice Scalia summed up: "[o]ur Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Id.* at 2543 (citing 3 Blackstone, *Commentaries*, at 373-74, 379-381). At trial, Midlen prevailed not only on a finding that Bar Counsel had not charged unauthorized action, but on the merits as well. *Supra* at 13-14. The lower Court's usurpation of the fact finding role was the same "judicial inquisition" as was condemned in *Blakely*.

Neither the misappropriation nor the unauthorized action charge was conceivable based on the Hearing Committee's findings of fact. Thus, the issue here is: are attorneys faced with losing their livelihoods and reputations[27] entitled to the same due process considerations[28] in the disciplinary process as are afforded those in peril of losing their freedom or their lives? This Court has never before confronted that issue, and it should.

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[25] Here, clear and convincing evidence.

[26] Here, the Board.

[27] *Bolling v. Sharpe, supra,* 347 U.S. at 499-500: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

[28] U.S. Const., amend V; *Id.* at amend XIV, § 1.

B. Due Process Has Long Meant Criminal Defendants Are Entitled to Be Able to Read a Statute and Comprehend Its Meaning; So Too, Must Attorneys Subject to Rules of Professional Conduct Be Entitled to Rely on Those Rules' Plain Meaning and Ordinary Grammatical Construction.

Essentially, the Court below can be heard to say it rejects Midlen's plain meaning and ordinary grammar arguments because it does not like what the Rules at issue would say if properly construed. Recently, this Court has gone to some lengths to set forth principles of statutory construction. *E.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh*, ___ U.S. ___, 125 S.Ct. 460 (2004); *Jama v. Immigration and Customs Enforcement*, ___ U.S. ___, 125 S.Ct. 694 (2005). In *Jama* this Court applied and described "the grammatical 'rule of the last antecedent,'" as "according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003)." 125 S.Ct. at 700-01. As set out above, the plain meaning and last antecedent rule are crucial to determining whether Midlen committed violations of Rules 1.15(b) or 1.16(d). Simply put, if the word "such" ordinarily refers back to that which immediately precedes it, then Midlen could not have violated Rule 1.15(b). And if the plain meaning of Rule 1.16(d) is that the client's interests must be protected upon an attorney's termination, there is simply no doubt there was no violation, irrespective of how long it took to transfer the files to successor counsel (or whatever the reason). These two

rules are virtually identical to the corresponding ABA model rules,[29, 30] and as such they, too, are in effect in most of the

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DC Rule 1.15(b)	ABA Rule 1.15(d)
Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.	Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

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various states. In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), Justice Douglas said: "This ordinance is void for vagueness . . . in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. . . .'" quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954). We ask that this Court determine that an attorney "of ordinary intelligence" is one who when reading a rule of professional conduct would ordinarily look to its plain meaning and/or apply basic rules of English grammar and that a court's abandonment thereof is not fair notice, constituting a deprivation of due process[31] under the Fifth and Fourteenth Amendments to the Constitution.

DC Rule 1.16(d)	ABA Rule 1.16(d)
In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....	Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which he client is entitled and refunding any advance payment of fee or expense that has not been earned. . . .

[31] *Bolling v. Sharpe, supra,* 347 U.S. at 499-500: "Liberty under law extends to the full range of conduct which the individual is

C. Section 10 of Article I of the Constitution Does Not Permit An Agency of the District of Columbia to Impair the Obligation of Contracts.

To be sure, the opinion of the Court below is not a "law" as set out in Article I, Section 10, but then neither have been most of the activities evaluated pursuant to the First Amendment, which provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ." We submit it is "unthinkable"[32] that the Court might do that as to which the United States Congress or the D. C. City Council is specifically prohibited.[33] Article I, Section 10, clause 1 provides "No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." While the District of Columbia is, technically, not a state, neither was it fifty-two years ago when *Bolling v. Sharpe, supra,* was decided.

All over the country, attorneys enter into engagement agreements where their legal fees are to be paid out of any recovery—whether that recovery be in tort or in collection. Once the recovery is either agreed to or paid in, the client must not be allowed to unilaterally alter the legal services agreement on pain of the attorney who adheres to same being

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free to pursue, and it cannot be restricted except for a proper governmental objective."

[32] *Id. at* 500.

[33] *Id.*

hauled before a disciplinary committee. Imagine a situation where counsel's agreement with his client permits deduction of, say, one third of any recovery, with the balance to be remitted to the client. A quarter million dollar settlement is negotiated and signed. While the funds are en route to the attorney's escrow account, the client dispatches a letter to his counsel advising that he now disputes the attorney's right to withdraw his fee, instructs counsel to remit all monies collected to the client, and informs counsel that he will be compensated when it is subsequently agreed between attorney and client as to how much the attorney is entitled. That, essentially, is what happened to Midlen.[34] Unthinkable that the attorney need change the course of action set out in his contract with the client? Not according to the challenged opinion below. Should not such client conduct be dismissed as patently absurd—and without force or effect? Not according to the challenged opinion below. The *Midlen* Court seems not to have perceived that when parties negotiate "in a state of uncertainty, the promisee who perceives a risk of bearing uncompensable reliance cost will insist on more favorable terms to offset those costs and risks"[35] or that unknown liability and ambiguity in contracts increase the cost of business. Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 Am. Bus. L.J. 441, 461 (2001).

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[34] Except his fees were per hour, not a percentage.

[35] Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 Hastings L.J. 621, 681 (1993)

It would appear that this Court has not heretofore determined that no instrumentality of a state can do what its state legislature is barred, on the face of the Constitution, from doing. This is an important question of federal law that should be settled by this Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the District of Columbia Court of Appeals.

Respectfully submitted,

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